IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 326/2003

Shri Ashok Toraskar,
resident of FX-4, Moonraker Apartments,
Alto, Mapusa, Bardez, Goa. ..... Appellant.

V/s.

Smt. Alka Ashok Toraskar,
resident of FX-4, Moonraker Apartments,
Alto, Mapusa, Bardez, Goa. ..... Respondent.

Mr. G. K. Sardessai, Advocate for the appellant.

Mrs. A.A. Agni, Advocate for the Respondent.

CORAM : P.V. KAKADE, J.

Date of reserving the Judgment ;
23.08.2006.

Date of pronouncing the Judgment :
18th October, 2006.

J U D G M E N T :

The unsuccessful defendant-husband in Matrimonial Petition No.65/99 has preferred this appeal against the Judgment and Order passed by the Civil Judge, Sr. Division, Mapusa dated 6.3.2003, decreeing the divorce in favour of the plaintiff-wife under Article 4(4) of the Law of Divorce as applicable to the State of Goa. It was directed that the custody

of the minor Amit Toraskar be given to the plaintiff till he attains majority with direction that the plaintiff shall maintain the said Amit till he attains majority. It may also be noted that the order in respect of the child is not challenged, but the order of divorce under Article 4(4) is the only subject-matter of this appeal.

2. Heard learned Counsel for both the parties. Perused the record.

The respondent-wife did file the matrimonial petition for divorce on the ground of cruelty and adultery as contemplated under Article 4(2) and (4) of the Law of Divorce. The plaintiff-wife came with a case that her marriage was solemnized as per Hindu religious rites on 22.11.79 and prior to that their marriage was registered in the Office of Civil Registrar at Mapusa on 13.11.79. After the marriage, the couple started residing in the matrimonial house at Tivim. It was alleged that on the next day of the marriage, the defendant informed the plaintiff-wife about his girl friend in Sharjah. The defendant-husband even told her that he was having physical sexual relationship with his next door neighbour. The plaintiff was shocked on hearing this. She tried to convince the defendant not to live the life of adultery, but in vain. On the fourth day of their marriage, while the couple were in the house, the sister of the

defendant offered alcoholic drink to her. The plaintiff was not accustomed to the environment. The defendant abused the plaintiff and said that she was a new comer in the house and his sister knew more about the defendant and his likes and dislikes and since then the quarrels and illtreatment began. According to the plaintiff, the defendant in the feat of anger literally pushed the plaintiff out of house and told her to go back to her mother's house. However, the plaintiff just sat outside the house crying and after long time the brother-in-law of the plaintiff came out of the house and took her inside the house. The defendant at the time of the marriage with the plaintiff was working in Sharjah. He left Goa on 30.1.80 for Sharjah, Dubai and later on the plaintiff also proceeded to Sharjah, in March, 1980.

The defendant was working in a Company, and to her horror, the plaintiff found that one girl by name Lifa was living with him in the same house. Though the defendant was just married with the plaintiff, instead of being in the company of the plaintiff, he would always go around with the said Lifa leaving the plaintiff alone in the house and used to return at 2 to 3 in the night. He was also a heavy drunkard and under the influence of alcohol the defendant used to physically assault the plaintiff on many occasions and used to use filthy language while abusing her. The plaintiff was then young girl, besides she was in an alien country and

therefore, she had no alternative, but to suffer the assaults and obscene abuses and harassment at the hands of the defendant. The said Life used to be in the house of the defendant practically everyday. After sometime, the plaintiff remained pregnant and baby girl was born in December, 1980, however, that did not deter the defendant from his misdeeds. The plaintiff came to know that the defendant was not only maintaining adulterous relationship with the said Lifa, but was also involved with her neighbour's wife. In short, it is the case sought to be made out by the plaintiff that the defendant was a person living in debauchrous behaviour. He was heavy drunkard, smoker and womanizer. The plaintiff has sought to make out a case that defendant was such a person that he used to flaunt his adulterous connection with Lifa and others, and used to humiliate the plaintiff in their presence. Around the year 1981, the parties returned to Goa to attend the wedding of the sister of the defendant and when the defendant was in Goa, he used to drink heavily and the plaintiff used to object to his drinking and was getting angry due to that. He left the child and the plaintiff in Goa and went back stating that until and unless the plaintiff would not apologize, the defendant would not take them back.

While she was living with her in-laws, she was also illtreated by them in various ways. Finally in or around 1987, the plaintiff came to Goa and took her with him. However, the same treatment continued and

the plaintiff got fed up with such behaviour of the defendant and left Sharjah and came down to Goa with her two children and purchased a flat out of her own savings at Mapusa where she started living.

On 2.12.94, the defendant came to the house and created scenes. The defendant started alleging that he had received two letters stating that the plaintiff was living in adultery and started abusing the plaintiff with loud voice and assaulted her with slaps, kicks, fist blows. She tried to run away in the room, however, the defendant caught hold of her by her neck and tried to strangulate her, pushed her and banged her on the wall, as a result, the plaintiff became unconscious. The minor son of the defendant who was in the house was so agitated that on seeing that he tried to assault the defendant with chapples. The defendant, thereafter, forcibly opened the cupboard of the plaintiff and took valuables of the plaintiff and went away. Thereafter, the plaintiff was convinced that the defendant was not interested in continuing with the marriage and finally legal notice came to be issued by the plaintiff showing her intention to take divorce by consent. The defendant by his letter dated 11.3.95 rejected the offer of the plaintiff and hence the plaintiff filed the matrimonial petition on the ground of cruelty and adultery under Article 4(2) and (4) on 2.12.1994. Pending the suit, the plaintiff also preferred amendment of the plaint, incorporating subsequent development which took lace on 27th, 28th

and 29th November, 1996 stating that the plaintiff and the defendant were staying away from the year 1989 and that the defendant had not gone to the flat of the plaintiff since December, 1994. The plaintiff filed interim application for injunction which was granted against the defendant and he was restrained from interfering with the life of the plaintiff.

3. The defendant contested the petition, inter alia, denying all the allegations and submitted that the plaintiff was living in adultery and did not want to continue with the marital relationship between them. On such and other grounds, the petition was dismissed.

4. The learned trial Judge, after hearing both the parties and recording evidence came to the conclusion that the plaintiff had proved that she was illtreated by the defendant as contemplated by Article 4(4) of the Law of Divorce. He also held that the plaintiff failed to prove that the defendant was living in adultery. Finding was also recorded to the effect that the defendant had failed to prove that the petition was false and vexatious and ultimately, decree came to be passed, as noted earlier. Hence the present appeal.

5. At the outset, it may be noted that perusal of the Judgment of

of the lower Court makes it clear that the trial Court has appreciated the entire evidence in proper perspective and has drawn logical conclusion while recording both the findings i.e. the plaintiff has proved the cruelty at the hands of the defendant and has not proved her allegation regarding the defendant's adultery.

6. Admittedly, the parties were married on 22.11.79 and the marriage was registered with the Civil Registrar, Mapusa on 13.11.79. The cause of action is stated to have arisen on 2.12.1994 when the defendant abused the plaintiff with obscene words and started physically assaulting her, which aspect, ultimately, forced her to file the suit. The perusal of the testimony of the plaintiff herself alone leaves no doubt about the trustworthiness of the plaintiff's version regarding illtreatment and physical as well as mental cruelty meted out to her at the hands of the defendant. The plaintiff has stated that the defendant had come to Goa in November, 1994 and used to stay sometimes with the plaintiff and sometimes with his mother, at which time the children of the plaintiff were studying and were aged 13 and 18 respectively. On 2nd December, 1994, at lunch time her daughter and aunty were taking lunch and the plaintiff was in the kitchen, at which time the defendant came and stated that he had received a letter which showed that the plaintiff had some relations with

another persons and that the plaintiff denied the same. On account of the same, there was quarrel between the plaintiff and the defendant and in the course, the defendant slapped the plaintiff and to avoid further assault at the hands of the defendant, the plaintiff was going in another room and at that time, the defendant caught hold of her and pushed her on the wall, on account of which she fell unconscious. Both her children tried to intervene, but in vain. Now, it is the case of the plaintiff that her aunty PW2 Premavati was in the house and she tried to intervene the assault. She has supported the testimony of the plaintiff regarding the incident. PW.4 Amit Toraskar, son of the plaintiff and the defendant has also supported the version of the plaintiff-mother. In my considered view, the child who was 8 years old at the time of the incident, has deposed about the incident when he was 13 years old. Perusal of his testimony leaves no doubt whatsoever regarding his trustworthiness. At any rate, there is absolutely no reason to imagine why the child should testify against his own father in support of his mother, unless the incident has indeed occurred as per his version. Therefore, the testimony of the plaintiff is fully corroborated by the testimony of her son which I have no doubt is trustworthy.

On the other hand, the evidence of the defendant is nothing but a denial of every other aspect and nothing has come out of it, especially when the cross examination of the plaintiff's witnesses shows that their evidence

is not at all shaken in any manner and, therefore, I concur with the findings recorded by the trial Court regarding the plaintiff being victim of physical cruelty at the hands of the defendant. The cumulative effect of the testimony of the plaintiff also is more than sufficient to establish that the plaintiff has proved her case in this regard.

7. The learned Counsel for the appellant vehemently urged that mere one incident of assault would not constitute physical cruelty or illtreatment as contemplated under the law. However, it must be noted, particularly in this case, that from the day one of the marriage, the plaintiff is being illtreated by the husband who is a drunkard. The expression "cruelty" has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the eqnuiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of

inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. That is what has happed in the present case. It is apparent from the record that she is subjected to cruelty right from the day one of the marriage since the year 1979 till it became unbearable for her to live with her husband and, therefore, started living independently by coming down to Goa from Sharjah since the year 1994.

8. The defendant, in his written statement as well as the evidence, has categorically stated that the plaintiff-lady was living in adultery. There is absolutely no iota of evidence in support of this version, either direct or circumstantial. Now, in my considered view, this very allegation shall constitute 'mental cruelty' to the plaintiff. In the case of ***Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate*** (2003) 6 SCC 334, the Apex Court has categorically led down that character assassination in or during divorce proceedings would amount to cruelty. The allegations against wife of unchastity, indecent familiarity with another person and

extramarital relationship if made in the written statement filed by the husband in the proceedings would constitute `cruelty'. Levelling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extramarital relationship constitute grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards, would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. Such allegations made in the written statement or suggested in the course of examination and by way of cross-examination satisfy the requirement of law. In the present case before us, the defendant has followed such course without any foundation and, therefore, in my considered view, the plaintiff would be entitled to divorce on the ground of mental cruelty due to the such blatant, baseless allegations made by the defendant in the course of the proceedings.

9. The evidence on record shows that the parties are living separately since the year 1994 till today. There is absolutely no whisper of possibility of reconciliation between them. In fact, the evidence on record is sufficient to show that the plaintiff-wife suffered a lot at the hands of the

defendant-husband from the the year 1979 when they were married. In other words, it is obvious that the marriage is broken down irretrievably. The learned Counsel for the appellant vehemently urged that the Apex Court has held in ***Shyam Sunder Kohli vs. Sushma Kohli alias Satya Devi,*** (2004) 7 SCC 747 (decided on 1st October, 2004) that the Court must not lightly dissolve a marriage on the ground of the fact that the marriage is broken down irretrievably. It observed that only in extreme circumstances the Court may use this ground for dissolving the marriage. However, the Apex Court has observed in the case of ***Durga Prasanna Tripathy vs. Arundhati Tripathy,*** (2005) 7 SCC 353 (decided on 23rd August, 2005) that when both the parties were living separately for almost 14 years and all endeavour to effect a reconciliation failed due to insistence of one party to remain separate from her in-laws and when there was no possibility of resuming normal marital life, then the marriage could be said to be irretrievably broken down and divorce could be granted on such ground.

10. I would hasten to add that this ground, in my view, is available in the fact situation involved in this case, in addition to the fact that the plaintiff has proved mental as well as physical cruelty i.e. the illtreatment as contemplated by Article 4(4) of the Law of Divorce as applicable in the

State of Goa.

11. Finally, in order to salvage the cause, the learned Counsel for the appellant made feeble attempt to urge that the entire trial is vitiated on the ground that the trial Court did not make any efforts to reconcile the marriage though it was mandatory under law. In this regard, it must be noted that though the record is silent on this aspect, the very fact that the marriage could not be reconciled is apparent as both the parties proceeded with trial making allegations and counter-allegations in the course of the trial against each other. Therefore, it cannot be said that non-attempt to make any efforts to reconcile the marriage would vitiate the entire trial of the matrimonial proceedings as, it could, at the most be said to be an irregularity. Moreover, the record apparently shows that the marriage was irretrievably broken down and there was no hope for reconciliation at all. Therefore, the submission in this regard on behalf of the appellant appears to be devoid of any merits.

12. As noted earlier, the plaintiff has failed to prove that the defendant was living adulterous life. The defendant has also alleged that it is a vexatious suit filed by the plaintiff. However, the evidence on record belies this allegation and shows that the plaintiff indeed has suffered

physical and mental cruelty at the hands of the defendant and, therefore, was entitled to decree of divorce, as granted by the lower Court. The reasoning adopted and the findings recorded by the trial Court appear to be just, legal and proper and, therefore, would brook no interference.

13. In the result, the appeal stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm/-